STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2013
v	No. 298474 Washtenaw Circuit Court
MARK ANTHONY PORTER, Defendant-Appellant.	LC No. 09-000365-FC

ON REMAND

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

TALBOT, J (*concurring*).

I concur in the result reached by the majority, but respectfully disagree with its reasoning in some respects.

The Supreme Court directed this Court to consider "whether the defendant was denied effective assistance of counsel because his trial counsel failed to object to the circuit court's unjustified shackling of the defendant during trial." *People v Porter*, 493 Mich 972; 829 NW2d 866 (2013). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for that deficient performance, a different outcome was reasonably probable. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Trial counsel's failure to object to the circuit court's shackling of defendant, without providing particularized reasons for the decision, was objectively unreasonable. A defendant "may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009) (citation and internal quotation marks omitted). When the plan to restrain defendant in the courtroom became known to defense counsel, counsel should have objected and insisted on findings as to the need for the restraint. Failure to do so was not strategic, but instead was performance below an objective standard of reasonableness.

In the context of analyzing an ineffective assistance of counsel claim challenging a conviction, the prejudice prong focuses on whether, but for counsel's deficient performance, the outcome of the trial might have been different. *Strickland v Washington*, 466 US 668, 694-695;

104 S Ct 2052; 80 L Ed 2d 674 (1984). If the shackles were not visible, then counsel's failure to object did not the affect the verdict. But in this case, defendant presented evidence that a juror observed the shackles during trial. At the evidentiary hearing, the trial judge attempted to replicate the juror's view and opined that he could not see the shackles from that position. The trial court remarked, "I find it extremely hard to understand how he could have seen the shackles," but was "not calling the juror a liar." I maintain the position I expressed in my prior opinion in this matter that defendant's shackles were seen by at least one juror.

"[S]hackling is 'inherently prejudicial.'" *Deck v Missouri*, 544 US 622, 635; 125 S Ct 2007; 161 L Ed 2d 953 (2005), abrogated in part on other grounds, *Fry v Plilar*, 551 US 112; 127 S Ct 2321; 168 L Ed 2d 16 (2007), quoting *Holbrook v Flynn*, 475 US 560, 568; 106 S Ct 1340; 89 L Ed 2d 525 (1986). "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process" by "suggest[ing] to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Deck*, 544 US at 630, quoting *Holbrook*, 475 US at 569. However, failing to object to shackling is *not* one of the "narrow class of situations" that lead to presumed prejudice in the context of an ineffective assistance of counsel claim. *People v Vaughn*, 491 Mich 642, 671; 821 NW2d 288 (2012) (stating that prejudice is presumed when counsel was either totally absent, prevented from assisting the accused during a critical stage of the proceeding, or burdened by an actual conflict of interest). Therefore, the deficiency in counsel's performance in this case must be evaluated in light of the totality of the evidence. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Strickland*, 466 US at 696.

Here, defendant's prior criminal convictions, his status as a parole absconder at the time of the offense, and his incarceration at the time of trial were revealed to the jury.[1] Shackling conveys that the justice system perceived a "'need to separate a defendant from the community at large,'" *Deck*, 544 US at 630, quoting *Holbrook*, 475 US at 569, and may be interpreted by the jury as an indicator of confidence in a defendant's culpability for the offenses for which he is on trial. However, where, as here, the jury is aware of a defendant's criminal past and current incarceration, the sight of shackles would not be surprising and would be understood as a precautionary measure in light of past convictions, without tarnishing the presumption of innocence concerning the pending offenses. The view of restraints would not have sullied defendant's credibility in these circumstances such that but for the viewing, a different outcome at the trial was reasonably probable. Therefore, with respect to defense counsel's failure to object to the shackling, defendant has not shown the prejudice necessary to prevail on his ineffective assistance of counsel claim. *Armstrong*, 490 Mich at 289-290.

Unlike the majority, I reach this conclusion without relying on the law of the case doctrine and the holding from this Court's prior decision concerning the due process claim. "The doctrine applies to questions specifically decided in an earlier decision and to questions

[1] The soundness of defense counsel's decision in that regard is not part of the Supreme Court's remand order.

necessarily determined to arrive at that decision." *Webb v Smith*, 224 Mich App 203, 209-210; 568 NW2d 378 (1997). "The doctrine is applicable only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Lenawee Co v Wagley*, 301 Mich App 134, ___; 836 NW2d 193 (2013) (citation and internal quotation marks omitted). The Supreme Court asked this Court to address "whether the defendant was denied effective assistance of counsel because his trial counsel failed to object to the circuit court's unjustified shackling of the defendant during trial." *Porter*, 493 Mich at 972. The Court specifically noted that this was an issue not addressed by this Court in its initial review. *Id*. Moreover, an exception to the law of the case doctrine exists "when the decision would preclude the independent review of constitutional facts." *Webb*, 224 Mich App at 210. See *People v Murphy*, 481 Mich 919; 750 NW2d 582 (2008). Therefore, I do not believe that the law of the case doctrine restricts this Court's review of the merits of the constitutional issue that the Supreme Court ordered this Court to address.

/s/ Michael J. Talbot